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Sectt. II-27—100,000—21-5-53.

Finance (1948) Department.

MS. SERIES.

G.O. No. 602

Dated 17-6-48

VIC

[Despatch Abstract.]

Ways and Means - Draft Constitution of India - Amendments proposed to article 169 and to item 48 in List I and items 6 and 34 in List II of Schedule VII - Letter to the Government of India - Papers Recorded.

Finance Department.

Letter No.31159 A W & M-2 dated 30-4-48.

the Government of India,
Ministry of Finance, New Delhi.

Sir,

Subject:- Draft Constitution of India.

Reference:- Constituent Assembly of India Notification No.C.A.99/Cons./47 dated the 26th February 1948.

I am directed to invite your attention to items 45 and 48 in List I- Union List- in the Seventh Schedule and to items 6 and 34 in List II - State List in the same schedule- and to state that item 6 in List II follows merely item 5 in List II - Provincial Legislative List in the existing Government of India Act, 1935.

2. The Public Debt of a Province is mostly in the form of Promissory Notes and the competence of the Provincial Legislature to legislate for debts secured by promissory notes was called in question previously. I am to invite your attention in this connection to the correspondence noted in the margin* in which reference was made to a case where the Federal Court held that certain sections of the Bengal Money Lenders Act, 1940, substantially affected entry 28 of the Fedral Legislative List with reference to Promissory Notes and were to that extent Ultra vires of the Provincial Legislature. The Government of India had the legal position examined and although they were of the view that the Provincial Government were competent to promote legislation under entry 5 of the Provincial List to cover all Provincial Government secnrities including Promissory notes, they addressed the Secretary of State to promote legislation in Parliament to amend the lists with retrospective effect, so as to secure full legal competance for Provincial Governments to legislate for Public Debt including Government Promissory Notes. The Privy Council, however, in delivering judgment in January 1947 on the Bengal Appeals held that the Bengal Money Lenders Act, 1940, was not void either in full or in part as it dealth with in pity and substance with money lending. The Government of India did not theer-therefore pursue further the matter of promoting legislation in parliament.

1. Government of India, Finance Dept. No.F.9 (12)-B/45 dated 28th July 1945.
2. Govt. of India, Home Dept. letter No.78/5/45/Pub.(S) dated 24th June 1946.
3. Govt. of India Finance Dept. letter dated 21st February 1947.

I am to request that the Government of India may kindly consider whether the relevant items in the list in the Seventh Schedule may be amended as in the draft enclosed, so as to put the matter beyond doubt. If the Government of India agree that it is desirable to make the amendments suggested, they may kindly take action to give notice of amendments to the Secretary to the Constituent Assembly.

Sd.....
21-4-48.

P.T.O.

This Government also consider that there are no special reasons why a provision anologous to sub-section (4) of section 163 of the existing Government of India Act - 1935 should not be embodied in the new Constitution and request that the Government of India may be pleased to give notice of the necessary amendments to the Secretary to the Constituent Assembly.

Sd.....
22-4-48.

Amendment.

(1) To item-48 in List I of Schedule VII, the following should be added, namely:-

"except as respects debt relief, the regulation of money lending and the public debt of any province".

(2) To item 6 in List II of Schedule VII, the following should be added, namely:

including such debt, secured on any of the instruments referred to in item 48 of List I."

(3) To item 34 in List II of Schedule VII the following should be added, namely.

"including as respects debt relief and the regulation of money lending, the lending of money on any of the instruments referred to in item 48 of List I".

Sd.

21-4-48.

No.F.7(47)-F.1/48.
Government of India.
MINISTRY OF FINANCE.
NEW DELHI, THE 17TH SEPTEMBER, 1948.

From

Rai Sahib O.P.Gupta,
Assistant Secretary to the Government of India.

To

The Secretary to the Government of Madras,
Finance Department,
Fort St. George,
MADRAS.

SUBJECT:- DRAFT CONSTITUTION OF INDIA.

Sir,

I am directed to refer to your letter No.31159A W&M-2, dated the 30th April, 1948, on the subject noted above.

2. The Government of India are advised that the reasons for which the amendments proposed in 1946 were dropped are equally applicable to the suggestion now made by the Government of Madras for amending the 7th Schedule to the Draft Constitution. The entries in the Seventh Schedule to the Draft Constitution which the Provincial Governments seek to amend are exactly the same as the corresponding entries in the present Constitution Act except that "money lending and money lenders" is now taken off from the "trade and commerce" entry and made the subject of a separate entry with the addition of "relief of agricultural indebtendness"(vide entry 28 in List I and entries 5 and 27 in List II of the present Act and entry 48 in List I and entries 6, 32 and 34 in List of the Draft Constitution). This change, if at all material makes the Provincial position stronger. Article 217 of Draft Constitution which sets out the legislative powers with reference to the three Lists in also in all material respects the same as the corresponding section 100 of the present Act. The decision of the Privy Council on the Bengal Money Lenders Act will, therefore, apply to the relevant entries in the Draft Constitution.

3. As regards the Provincial Power regarding money lending and money lenders, the position of the Provinces (or States in part I of the Ist Schedule) under the Draft Constitution is thus reasonably safe. The Privy Council has now laid down that the validity of a Provincial legislation on the subject will be judged by the test whether it is in ~~pith~~ pith and substance relatable to the Provincial entry and if it is so relatable, the extent of its encroachment on a subject in the Central sphere will be immaterial. This is sufficient to render valid all Provincial debt legislation properly relatable to the relevant Provincial entry though it deals indirectly with promissory notes or other instruments mentioned in the Federal entry 28. The framers of the Draft Constitution are entitled to proceed on the law as it is settled at the time when the Constitution is framed and the Constitution which they frame will be interpreted in accordance with such law. The Privy Council decision leaves no doubt that even under the new Constitution as it is proposed, debt legislation undertaken by the States, if in pith and substance it is relatable to entry 34 in the State List, will be valid

Cont.2

valid though it deals incidentally with any of the instruments mentioned in entry 48 in the Union List.

4. Similarly as regards the Provincial power regarding "~~pu~~ public debt of the Province", although the decision of the Privy Council does not directly bear on this point, the principle of that decision will apply with equal, if not greater, force in this case. Provincial legislation with regard to public debt of the Province as, for example, on the lines of the Indian Securities Act 1920 or the Public Debt (Central Government) Act, 1944, will in pith and substance be relatable to the Provincial entry and the fact that it incidentally deals with promissory notes by reason of the fact that public debt of the Province sometimes takes the form of such notes will not invalidate such legislation.

5. The position of the Provinces is therefore reasonabley safe in respect of both the matters and the Government of India do not consider it necessary to amend the relevant legislative entries.

6. As regards the second proposal of the Provincial Government, namely, that clause 269 of the Draft Constitution should contain a provision corresponding to sub-section (4) of Section 163 of the present Act, the Government of India do not feel justified in sponsoring ~~tis~~ this amendment which appears to have been omitted by the Drafting Committee after full consideration.

Yours faithfully,

Sd.....
(O.P.GUPTA)

Assistant Secretary to the Government of India.

Finance (Ways and Means)

Subject:- DRAFT CONSTITUTION OF INDIA.

Portions in the draft constitution of India relating to borrowing by Provincial Governments are noted on in the Sectional Notes below.

With reference to pages 1-3 of Sectional Notes below, a draft letter to the Secretary, Ministry of Finance suggesting for their consideration certain formal amendments (identical with the amendments proposed by the Government of India in 1946 to the 1935 Act) is also submitted.

The Legal Department may see for remarks before the issue of the draft.

(Honourable Minister Finance may see after issue)

Sd.....
21-4-48.

*It is only a suggestion to the Government of India to consider amendments proposed by them previously with the concurrance of Provincial Governments.

I think that we may as well ask for a provision analogus to section 163(4) to be embodied in the new constitution Draft - added to.

Sd.....

Legal Department.

Seen in Legal. -The Dfaft is in order. Two or three ormal alterations have been made in red.

Sd xx xx
25-4-48.

The draft letter to the Government of India may now be issued as altered by Legal Department. After issue the file may be circulated to Honourable Minister (Finance) for ~~personal~~ perusal.

He may see
before issue in view
of the addition I
have made

Sd xx xx
29-4-48.

Finance (Ways and Means)

The papers may be recorded as a G.O. for future reference. (The next session of the Constituent Assembly is reported to have been postponed to November '48)

Government of Madras.

Abstract.

Ways and Means - Draft Constitution of India - Amendments proposed to article 269of and to item 48 in List I and items 6 and 34 in List II of Schedule VII - Letter to the Government of India - Papers Recorded.

Finance Department.

G.O.Ms. No.602 dated 17-6-48.

O R D E R :

RECORDED.

Sd.....

14-6-48.

/True copy/

Superintendent, 13.8.57
Madras Record Office.

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17/7

Finance (Ways & Means)

Subject DRAFT CONSTITUTION OF INDIA - CERTAIN AMENDMENTS RELATING TO DEBT LEGISLATION.

...

From the Government of India, Ministry of Finance, No.F.7(47)-F.1/48 dated the 17th September 1948.

The Government of India's letter in the current file is in reply to our letter dated the 30th April 1948 asking the Government of India to consider certain amendments to the relevant items in the list in the Seventh Schedule relating to debt legislation and in regard to the introduction of a sub-section analogous to sub-section (4) of Section 163 of the Government of India Act, 1935. In paragraphs 1 to 3 of their letter, the Government of India have argued that no formal amendments to the relevant items in the Seventh Schedule of the Draft Constitution are necessary. They have stated that, so far as debt legislation is concerned the Privy Council decision - portion A on page 63 c.f. of G.O.No.862 Finance dated 6th November 1947 - leaves no doubt that even under the constitution now proposed, debt legislation undertaken by the States (Provinces), if in pith and substance it is relatable to entry 34 in the State (Provincial) list, will be valid even though it deals incidentally with any of the instruments mentioned in entry 48 of the Union List. Similarly, as regards provincial powers relating to the Public Debt of the Province, the Government of India state that although the decision of the Privy Council does not directly bear on this point, the principle of that decision will apply with equal, if not greater, force in this case also. They conclude therefore that the position of the Provinces is reasonably safe in respect of both the matters and hence they do not consider it necessary to amend the relevant legislative entries.

2. This Government were already aware that under the Privy Council's decision, the competence of the Provincial Legislature in regard to both the items was no disputable; but the amendments were suggested mainly because of the opportunity afforded by the draft of a new Constitution Act. As the Government of India, however feel that the amendments are not necessary. perhaps it is not worth while to press the matter.

3. Provision analogous to Section 163 (4) of the Government of India Act, 1935. Sub-section (4) of section 163 of the Government of India Act, 1935, provides that the Government of India shall not ~~unreasonably~~ unreasonably with-hold their consent for Provinces raising loans themselves. This subsection has been omitted in the new Draft Constitution. It was suggested that there was no special reason why the States under the new constitution should not have the same assurance repeated under Article 268 of the Draft Constitution. The Government of India consider that they will not be justified in sponsoring this amendment, as the provision appears to have been omitted by the Drafting Committee themselves after full consideration.

It would appear from the above, that the omission is deliberate - Cf. also the notes on page 9 N.F. of G.O.No.602 Finance dated 17th June 1948. Perhaps, it is not worth-while to press for the inclusion of this provision. After all the omission enables a corrective to be applied to a Province which departs from the path of Financial rectitude . No further action is called for

Cont.

Honourable Minister (Finance) may see.

4. Before Circulation Legal may see the case.

Sd.....
6-10-48

No (1) is purely a matter of form and in view of the reply given it is not worthwhile pursuing it.

As regards No(2) we may presume that the Government of India will not with-hold consent "unreasonably" and if we press the matter it amounts to saying that we apprehand that they may be "unreasonable" on occasions. The reply of the Government of India does not indicate why exactly the provision in the Government India Act - 1935 was omitted - has possibly the reason was namely that the constitution need not- contemplate any Government acting "unreasonably". The matter is hardly one in which this Government need "sponsor" an amendment.

Sd.....
6-10-48.

Legal Department.

Seen in Legal.

Sd.....
17-10-48

Finance (W&M)

The file may be circulated to Honourable Minister(Finance) for perusal.

Sd.....
22-10-48

DRAFT CONSTITUTION - LEGISLATIVE LISTS.

As in the Existing Government of India Act, 1935. (1)	As in the Draft Constitution. 2)
Seventh Schedule.	Seventh Schedule.
List I - Federal Legislat... List	List I - Union List.
6. Public Debt of the Federation.	45. Public Debt of the Union
28. Cheques, Bills of Exchang Promissory Notes and other like instruments.	48. Cheques, Bills of Exchange, Promissory notes and other like instruments.
List II - Provincial Legislative List.	List II - State List.
5. Public Debt of the Province.	6, Public X Debt of the State.

cont

27. x x x x Money Lending and Money lenders.	34. Money lending and money lenders; relief of agricultural indebtedness.

The nomenclature of the relevant items in the Seventh Schedule of the Draft Constitution is the same as that in the Seventh Schedule of the existing Government of India Act, 1935, except for the addition of the words "relief of agricultural indebtedness" in item 32 of List II - State List in the Draft Constitution. Ordinarily, no remarks seem called for on these items.

It may, however, be mentioned that the question previously arose whether the Provincial Government would be competent to legislate in pursuance of entry 5 of the Provincial Legislative List to cover so much of the Public Debt of the province as was secured on promissory notes in view of the item "promissory notes" being included in item 28 of the Federal Legislative List. In a case referred to in the " All- India Reporter 1945" F.C.2, the Federal Court held that certain sections of the Bengal Money Lenders Act, 1940 substantially affected item 28 of the Federal Legislative List with reference to promissory notes and that those sections were to that extent ultra vires of the Provincial Legislature. To set the position correct, the Government of India themselves moved the Secretary of State for India in 1946 to promote legislation in pariliament to amend the list. in Schedule 7 of the Government of India Act, 1935, with retrospective effect so as to include in entry 5 of the Provincial List "Public Debt secured on any of the instruments referred to in item 28 of List I" Subsequently, however, the Privy Council which considered the Bengal Appeals held that the Bengal Money Lenders Act was not void either in whole or in part as it dealth in pith and substance with money lending. In view of this later decision, the Government of India did not ~~pusue~~ pursue the question of promoting legislation in the parliament. The point therefore now arises whether it would not be better to take the opportunity now afforded in drafting the new constitution to amend the relevant items in the Legislative List beyond any doubt.

(1) To item 48 in List I of Schedule VII, the following should be added, namely:-

> "except as respects debt relief, the regulation of money lending and the public debt of any Province".

(2) To item 6 in List II of Schedule VII. the following should be added. namely:-

> "including such debt secured on any of the instruments referred to in item 48 of List I

(3) To item 34 in list II of Schedule VII the following should be added, namely:-

> "including as respects debt relief and the regulation of money lending, the lending of money of any of the instruments referred to in item 48 of List I".

The Secretary to the Government of India, Ministry of Finance, may perhaps be addressed suggesting the desirability of making the above amendments. It may be left to the Government of India to take action to give notice of amendments etc. if they consider it necessary to do so.

22-10-48

RAFT CONSTITUTION - POWER OF PARILIAMENT TO LEGISLATE OR PROVINCES.

Government of India Act, 1935. (1)

103. If it appears to the Legislatures of two or more Provinces to be desirable that any of the matters enumerated in the Provincial Legislative List should be regulated in those Provinces by Act of the Federal Legislature, and if resolutions to that effect are passed by all the Chambers of those Provincial Legislatures, it shall be lawful for the Federal Legislature to pass an Act for regulating that matter accordingly, but any Act so passed may, as respects any Province to which it applies, be amended or repealed by an Act of the Legislature of that Province.

Draft Constitution. (2)

229(1) If it appears to the Legislature of Legislatures of one or more States to be desirable that any of the matters with respect to which parliament has no power to make laws for the State or States except as provided in articles 226 and 227 of this Constitution should be regulated in such State or States by Parliament by law, and a resolution or resolutions to that effect is or are passed by the House, or where there are two houses, by both the Houses of the Legislature of the State or of each of the States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly, and any Act so passed shall apply to such State or States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State.

(2) Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which it applies, be amended or repealed by an Act of the Legislature of that State.

Finance (Ways & Means)

Article 229 which is to take the place of Section 103 of the Government of India, 1935, seems to be more comprehensive and also elastic except that the subparagraph (2) under the article takes away the power of a Province to amend or repeal an Act passed by the Central Legislature which it had under the existing Section 103. For practical purposes, the withdrawal of this power may not materially affect the legislative powers of the Province.

(After the passing of the Public Debt (Central Government) Act, 1944, the Public Debt of a Province is now governed by the old Indian ~~Securities Act, 1920~~ Securities Act, 1920. All the Provincial Governments have already passed resolutions in both the Houses of Legislatur in pursuance of Section 103 of the Government of India Act, 1935. and communicated them to the Government of India

Cont.2

it is not clear whether if the Central Legislature does not pass an Act applying the Public Debt (Central Government Act, 1944, to the Provinces before the new Constitution comes into effect, the Provincial Government's will again have to pass resolutions with reference to Article 229 of the Draft Constitution.).

No action is necessary in regard to article 229 of the Draft Constitution..

Sd xx xx
21-4-48.

provincial BORROWING.

Existing Act.	Draft Constitution.
163 (1) Subject to the provisions of this section, the executive authority of a Province extends to borrowing upon the securityof the revenues of the Province within such limits, if any, as may from time to time be fixed by an Act of the Provincial Legislature and to the giving of guarantees within such limits, if any as may be so fixed.	269 (1) Subject to the provisions of this article the executive power of a State for the time being specified in Part I of the First Schedule extends to borrowing within the territory of India upon the security of the revenues of the State within such limits, if any, as may from time to time be fixed by the Legislature of such State by law and to the giving of guarantees within such limits, if any, as may be so fixed.
(2) The Federation may subject to such conditions, if any, as it may think fit to impose, make loans to/the last preceding section are not exceeded, give guarantees in respect of loans raised by, any Province and any sums required for the purpose of making loans to a Province shall be charged on the revenues of the Federation.	(2) The Government of India may, subject to such conditions, if any as it may think fit to impose, make loans to States for the time being specified in Part I or Part III of the First Schedule or so long as any limits fixed under the last preceding article are not exceeded, give guarantees in respect of loans raised by any such State and any sums required for the purpose of making such loans shall be charged on the revenues of India.
(3) A Province may not without the consent of the Federation borrow outside India, nor without the like consent raise any loan if there is still outstanding any part of a loan made to the Province by the Federation or by the Governor- General in Council, or in respect of which guarantee has been given by the Federation or by the Governor-General in Council.	(3) A State for the time being specified in Part I or Part III of the First schedule may not without the consent of the Government of India raise any loan if there is still outstanding any part oa a loan which has been made to the State by the Govefnment of India or its predecessor Government or in respect of which a guarantee has been given by the Government of India or by its predecessor Government.
A consent under this subsection may be granted subject to such conditions, if any, as the Federation may think fit to impose.	A consent under this clause may be granted subject to such conditions. any, as the Government India may think fit

Cont. 3

4) A consent required by the last preceding sub-section shall not be unreasonably with-held nor shall the Federation refuse, if sufficient cause is shown, to make a loan to, or to give a guarantee in respect of a loan raised by, a Province, or seek to impose in respect of any of the matters aforesaid any condition which is unreasonable, and if any dispute arises whether a refusal of consent or a refusal to make a loan or to give a guarantee, or any condition insisted upon, is or is not justifiable, the matter shall be referred to the Governor Generaland the decision of the Governor General in his discretion shall be final.

Finance (Ways & Means)

Article 269 in the draft Constitution follows Section 163 of the existing Government of India Act, 1935, except that the fourth sub-section under Section 163 of the existing Act has not been repeated in the Draft Constitution.

The provision in sub-article (1) of Article 269 of the Draft Constitution is the same as that in the existing Section 163 (1) of the Government of India Act, 1935. The Madras Legislature has not so far passed any law fixing t limits to Provincial borrowing. The amount to be borrowed in each year is determined with reference to the estimated expenditure on Irrigation and Electricity Schemes and the estimated amount required for relending to local bodies, agriculturists etc. The approval of the Legislature to the estimated capital expenditure and for relending to local bodies, agriculturists etc. implies sanction for the provision of funds required and there can be no objection to raise the amount required by borrowing. There has been no need so far to fix any limit for borrowing by an Act of the Legislature. Provincial Legislation on the subject can be only restrictvie in nature and not compulsory and it was previously held that a future Government would be in the least likely to impose restrictions of its own volition when they are under no compulsion to do so. The question of fixing limits to Provincial borrowing by an Act of the Provincial Legislature will not therefore airse.

Sub-Articles (2) and (3) of the Draft Constitution follow the provisions in the existing sub-sections (2) and (3) of Section 163 of the Government of India Act, 1935. As at present we have to obtain the Central Government's sanction for out short and long term borrowings as we are still indebted to the Government of India. This position is not likely to be materially altered in the near future, as we cannot wipe out the outstanding balance of about Rs. 3½ crores of the consolidated debt, earlier than 1960, and the loan of Rs. 6 crores taken from the Government of India in November 1947 is repayable only in November 1962. The Madras Government will also be borrowing from the Government of India in the coming years for financing Post-war Development schemes.

Sub-section (4) of Section 163 of the existing Act providing that the Government of India shall not unreasonably withhold their consent for Provinces raising loans themselves has been omitted in the draft constitution. The

Cont

The omission is apparently deliberate, so that under the last sub-paragraph of Article 269(3) corresponding to existing Section 163(3) of the Government of India Act, 1935, the Government of India may give their consent subjee subject to such conditions, if any, as they may think fit to impose. This provision no doubt enables a corrective to be applied to Provinces which depart from the paths of financial rectitude. The States under the new set-up, and in their full-fledged Provincial Autonomy, may think of raising loans by offering unduly favourable terms to the market for financing large and ambitious programmes of development (e.g. the recent proposal to finance building grants for aided educational institutions by borrowing). The omission of sub-section (4) of section 163 in the draft constitution does not seem to call of any protest.

No action is necessary in regard to Article 269 in Draft Constitution.

Sd xx xx
21-4-48.

I think that there is no special reason why the State under the new constitution should not have the assurance in sub-section (4) that the Government of India will not with-hold consent unreasonably - as in the existing act. I have added to the Draft to the Government of India.

Sd xx xx
22-4-48.